DATE: May 24, 1995
CASE NO. 93-ERA-12

IN THE MATTER OF

SUSAN YULE,

COMPLAINANT,

v.

BURNS INTERNATIONAL SECURITY SERVICE,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Complainant Susan Yule alleges that Respondent Burns International Security Service (Burns) violated the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C.A. § 5851 (West 1994), when it discharged her from her position as a security officer assigned to the Prairie Island Nuclear Generating Plant (Prairie Island) in Minnesota. Burns contracted with licensee Northern States Power Co. (NSP) to provide security guards at Prairie Island. The Administrative Law Judge (ALJ) found that Burns violated the ERA because it fired Yule in retaliation for her complaints about safety and plant security at Prairie Island. Recommended Decision and Order (R. D. and O.) at 23. [1] The ALJ's findings of fact, R. D. and O. at 5-13, are well supported in the record and I adopt them. However, I disagree with the ALJ because I find as a matter of law that Burns proved that it legitimately would have discharged Yule even if she had not raised any concerns about nuclear safety. Accordingly, I dismiss the complaint. [2]

Timeliness of the Complaint

Yule was discharged from her position with Burns effective

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September 3, 1992 and filed this complaint 58 days later, on October 31, 1992. At the time of Yule's discharge, ERA Section 210 provided that an employee who believes she has been discharged in violation of the employee protection provision may

file a complaint alleging a violation "within thirty days after such violation occurs." 42 U.S.C. § 5851(b)(1) (1988).

Section 2902 of the Comprehensive National Energy Policy Act of 1992 (CNEPA), enacted on October 24, 1992, amended Section 210(b) by, *inter alia*, enlarging the time for filing a complaint to 180 days and renumbering Section 210 as Section 211. Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992). Subsection 2902(i) of the CNEPA provides:

> The amendments made by this section shall apply to claims filed under section 211(b) of the Energy Reorganization Act of 1974 (42 U.S.C. 5851(b)(1)) on or after the date of the enactment of this Act.

Id.

Respondent argues that the 180-day filing limit of ERA Section 211(b) does not apply because, absent an explicit provision in the statute, a new or extended statute of limitations will not be applied retroactively to revive an otherwise extinguished claim. Resp. Br. 20-21. [3] Burns contends that Yule's claim was "extinguished" 30 days after her discharge. *Id.* at 15.

Burns relies on *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (9th Cir. 1993), in support of its argument that the old limitation period applies. Resp. Br. at 20. In that case, the issue was whether a housing discrimination suit was barred by the 180 day statute of limitations that existed prior to the Fair Housing Amendments of 1988, which extended the limitation for private suits to two years. In that case, "the [Fair Housing Amendments] Act itself delay[ed] its effective date for 180 days after its enactment." 895 F.2d at 1527. Congress therefore ensured that any act of discrimination that occurred prior to the date of enactment of the 1988 amendments would come under the 180-day limitation period and that the new two year period would apply only to acts of discrimination that occurred on or after the enactment of the amendments. Thus, it was logical for the Court to state in *Bellwood* that a new statute of limitations

"would not apply to a claim that became barred under the old law before the new one was enacted." *Id.*

In this case, however, the 1992 CNEPA amendment to the ERA's limitation period took effect the exact date the Act was signed into law. Subsection 2902(b) amends the ERA's time limitation to 180 days and subsection 2902(i) applies the 180 day limit to "claims filed under section 211(b) . . . on or after the date of

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the enactment of this Act." Thus, by the CNEPA's terms, the new 180 day limitation applies to any claim filed on or after October 24, 1992, including this claim filed on October 31 of that year.

I find that the application of the 180-day limitation of Section 211(b) is not retroactive in this case. Further, I find that under the ERA, as amended by the CNEPA, Yule's complaint was timely filed 58 days after her discharge. [4]

Discussion

> For complaints filed under Section 211:
> The Secretary may determine that a violation of subsection (a) has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint. [5]

42 U.S.C.A. § 5851((b)(3)(C) (West 1994).

Since Burns presented evidence to rebut Yule's *prima facie* case of an ERA violation, it is not necessary to engage in a lengthy analysis of all of the elements of a *prima facie* case. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Final Dec. and Order, Feb. 15, 1995, slip op. at 11 and n. 9, *petition for review docketed*, No. 95-1729 (8th Cir. Mar. 27, 1995). I agree with the ALJ's finding that Yule established a *prima facie* case. See R. D. and O. at 18.

The burden then shifted to Burns to articulate a legitimate reason for the discharge, *see Carroll*, slip op. at 10, and Burns did so by explaining that it fired Yule for refusing her superior's order to sign a memorandum indicating her understanding of the operation of a special door lock.

Yule had the opportunity to counter Burns' evidence by establishing that the asserted legitimate reason was a pretext for discrimination. *Id.* The ALJ found that Burns' actions immediately prior to the discharge demonstrated that Yule's protected activities were a contributing factor in the decision to discharge her. R. D. and O. at 18. I agree. Larry Jones, who was Burns' Interim Site Security Manager, notified Yule by letter that she was suspended pending an investigation of her insubordination of August 25-26, 1992. The notice indicated that the investigation also would include Yule's earlier warnings and reprimands for insubordination. CX 14. As the ALJ explained, the earlier warnings and reprimands concerned some of the protected activities in which Yule had engaged. R. D. and O. at 18. For example, Burns earlier had reprimanded Yule concerning her complaint about the posting of an unarmed guard, [6] and relied on that incident in its report on the investigation of the final incident of insubordination which

precipitated Yule's

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discharge. *See* RX 10 and attachment 6. I find that Burns itself demonstrated that Yule's protected activities were a contributing factor in the discharge decision.

Since illegitimate motives played a part in Burns' decision, this case turns on the application of a "dual motive" analysis. *See Carroll*, slip op. at 10. The new statutory language at § 5851 (b)(3)(C) and (D) raises the respondent's burden of proof under a dual motive analysis, as explained below.

Under former Section 210(b), where the fact finder concluded that the complainant has proven that the employer acted, at least in part, for retaliatory reasons, the burden shifted to the employer to prove by a preponderance of the evidence that, although improper motive played a part in its action, it would have taken the same action regarding the complainant even if no improper motive existed. *Carroll*, slip op. at 10 (under ERA prior to 1992 amendments); *Ewald v. Commonwealth of Virginia*, Case No. 89-SDW-1, Dec. and Remand Order, Apr. 20, 1995, slip op. at 13 (under analogous provision of several environmental statutes).

Under the amended ERA, a respondent may avoid the ordering of any relief for an alleged ERA violation "if the employer demonstrates by *clear and convincing evidence* that it would have taken the same unfavorable personnel action in the absence" of the complainant's protected activities. 42 U.S.C.A. § 5851(b)(3)(D) (emphasis added). *See* R. D. and O. at 15. While there is no precise definition of "clear and convincing evidence," the courts recognize that it is a higher burden than "preponderance of the evidence" but less than "beyond a reasonable doubt." *[7]* *E.g.*, *Grogan v. Garner*, 498 U.S. 279, 282 (1991) and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 n. 11 (1991).

Turning now to this case, I will determine whether Burns demonstrated by clear and convincing evidence that it would have discharged Yule in the absence of her engaging in protected activities. Burns' witnesses testified that security officers must obey orders promptly and without question. T. 398-399, 483-484. The company contends, therefore, that it was lawful to discharge Yule for refusing her superior's order.

As part of a routine inspection at Prairie Island on August 24, 1992, an NRC inspector asked a security guard about his knowledge of a door with a special electromagnetic lock. T. 366, 405-406; RX 5. The guard replied that he knew nothing about the door, RX 5, and the inspector expressed concern to the NSP Security Shift Supervisor that the guard did not understand the operation of the door. RX 5, RX 10; T. 406. As a result, Burns decided to reissue an earlier memorandum explaining the door's locking device. CX 13; T. 407. The security guards were given

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time to reread the memorandum and ask questions concerning the operation of the door. The guards were then asked to sign a document attesting to having read the memorandum and having received answers to any questions they had about the operation of the door. T. 86, 93-94, 103, 366, 390-392, 407-408, 411, 449-

450; RX 5.

At a briefing prior to the start of a shift later that day, Lt. Stephen Bangasser distributed the earlier memorandum concerning the door's locking device, read a portion of it to the assembled guards, and gave them the opportunity to ask questions. T. 203-205, 287, 292-293, 309, 367-368; RX 4; RX 6 at p. 1. Bangasser told the guards to reread the memorandum during the course of the shift, ask any other questions, and sign it indicating that they had read the memorandum. T. 205, 209-210, 367-368; RX 6.

Lt. Bangasser testified that Yule read the memorandum and asked him questions about the security device, that he answered Yule's questions, and that Yule told him that she understood the operation of the device. T. 370-371, 391; RX 6 at p. 1-2; R. D. and O. at 16. Yule conceded that she knew how to operate the door and so informed Bangasser. T. 209, 288. When Bangasser asked Yule to sign the memorandum documenting her understanding of the device, Yule refused because she believed she had not received proper training concerning the operation of the door. T. 207-208, 289, 371-374; RX 6 at p. 2. Yule further testified that she told Bangasser that she believed having her sign the memorandum was a "coverup to the NRC." T. 208, 210-212, 291-292.

According to Bangasser, Yule stated that she would not sign the memorandum because training on security equipment should occur in a training center, not during a guard shift and that her signature would indicate that informal training was acceptable. T. 373, 452-453; RX 4; RX 6 at p. 2. The ALJ credited Bangasser's version of events, that Yule did not mention an NRC coverup. R. D. and O. at 16-17. I concur in the ALJ's credibility assessment. [8]

Upon being hired by Burns when it took over the contract to provide security at Prairie Island, Yule signed a document acknowledging that insubordinate conduct directed toward a supervisor constituted sufficient cause for immediate discharge. CX 3. It is undisputed that Burns gave Yule several

opportunities to sign the memorandum. [9] Yule conceded that Bangasser directed her to sign the memorandum. T. 289-290. The ALJ credited Bangasser's testimony that he warned Yule that refusal to sign would be an act of insubordination that would not be tolerated. R.D. and O. at 17. Yule informed Bangasser that she preferred to be written up rather than sign the memorandum. T. 373; RX 10 at Attach. 2 and 4.

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Notwithstanding the established policy of discharge for insubordination, the finding that Yule disobeyed her supervisor's order to sign the memorandum, and the additional finding that "Burns has shown that it discharged [other] employees who refused to obey the direct order of a superior," R. D. and O. at 23, the ALJ nevertheless found in favor of Yule. The ALJ stated that:

> Since Burns has not shown that it has discharged any other employee for refusing to sign a training document, and having determined that Burns does not always discharge its employees who commit "insubordination," I conclude that Burns has not proven that it would have terminated Ms. Yule's employment even if she had not engaged in protected activity.

Id.

Under the ALJ's analysis, Burns' only means to avoid liability was to show that it took the same action against an employee for the identical offense. The ALJ faulted Burns for not showing that it had discharged other employees "who committed a minor act of insubordinate conduct." R. D. and O. at 23. The ALJ found the evidence that Burns had discharged several other

employees for refusing a superior's direct order too dissimilar to be persuasive. *Id.*

I disagree with the ALJ's analysis because it holds Burns to a higher burden of proof than clear and convincing evidence. Labor Relations Manager Guy Thomas gave five instances in which Burns discharged employees for refusing to obey a supervisor's order. T. 487-490. I disagree with the ALJ's implicit assessment that the orders disobeyed by the other five employees were more significant or important than the order that Yule disobeyed. For example, Burns discharged a guard for disobeying an order to leave the plant when he entered the cafeteria to eat a late lunch after the conclusion of his work shift. T. 487-488; RX 16. I consider entering the cafeteria against orders to be no more or less significant an act of disobedience than refusing to sign a memorandum reflecting understanding of a security device. I find that Burns established unequivocally that it viewed disobedience of any direct order as an offense meriting discharge. [10]

I further find that Burns was consistent in firing Yule for refusing to sign the safety device memorandum and firing a different security guard, Ms. Pasquale, for refusing to sign a reinstatement agreement arising out of an arbitration decision. *See* T. 489-490. The ALJ distinguished Pasquale's firing because it was later overturned by an arbitrator. R. D. and O. at 23. Whatever the merit, under the union-management bargaining agreement, of firing Pasquale, it nevertheless showed that Burns

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viewed refusing an order to sign a document as a serious offense.

I am also not convinced by the ALJ's reasoning that since Yule was not discharged for a previous incident of insubordination, she should not have been discharged for refusing to sign the memorandum. Yule's February 1992 insubordinate conduct consisted of questioning her supervisor's judgment about the posting of an unarmed guard, not disobeying a direct order. I find it reasonable for Burns not to discharge Yule for the February incident and to discharge her for her later refusal of a direct order to sign a document.

Conclusion

I find that Burns demonstrated by clear and convincing evidence that it would have discharged Yule for refusing her superior's order to sign the memorandum, even if she had never

engaged in activities protected under the ERA. Accordingly, the complaint is dismissed. [11]

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The Recommended Decision and Order was issued on June 24, 1993. The ALJ also issued a Supplemental [Recommended] Decision and Order Granting Attorney's Fee on October 22, 1993.

[2] In light of the dismissal, the ALJ's Supplemental Decision awarding attorney's fees to Complainant is moot.

[3] Burns has taken inconsistent positions during the course of this case. In a December 1992 Petition to Dismiss a Frivolous Complaint, Burns argued that the CNEPA amendments applied and required dismissal of the complaint. The ALJ denied the petition in the January 6, 1993 Order Denying Respondent's Motion to Dismiss.

[4] In light of my finding that the complaint was timely under the 180-day limitation period of Section 211(b), there is no need to determine whether the 30 day limitation of former Section 210(b) was equitably tolled in this case. *See* R. D. and O. at 3-4. I find the ALJ's R. D. and O. internally inconsistent because on the one hand, the ALJ found that the 30-day limitation of former Section 210 applied and was tolled equitably, and on the other hand, the ALJ applied the burdens of proof of new Section 211. *See* R. D. and O. at 3-4 (limitation period) and 13 (applying amended burden of proof).

[5] Section 5851(a)(1)(A) through (F) is set out below:

> (a)(1) Discrimination against employee
>
> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
>
> (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
>
> (B) refused to engage in any

> practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or any proposed provision) of this Act or the Atomic energy Act of 1954;
>
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

[6] I agree with the ALJ's finding that Yule's complaint to her supervisor about the unarmed guard was protected under subsection (a)(1)(A). *See* R. D. and O. at 16.

[7] The courts simply state whether enumerated evidence either meets or does not meet the "clear and convincing" level. For example, in *Ballard v. Commissioner of Internal Revenue*, 740 F.2d 659, 662 (8th Cir. 1984), the court found that a taxpayer's pattern of underreported income, failure to report any business activities in certain years, statements to his tax preparer falsely denying business activities in those years, and failure to maintain adequate records of business transactions constituted clear and convincing evidence of fraudulent intent.

By contrast, in *Henson v. Commissioner of Internal Revenue*, 835 F.2d 850, 854 (11th Cir. 1988), the court found that a witness's statements were so "equivocal" that they did not constitute legitimate evidence regarding the date of certain documents and did "not amount to clear and convincing evidence of fraud."

And in a federal employee whistleblower case, the court found that a witness's "subjective evaluation" and the "weak corroboration of the other witnesses cannot amount to clear and

convincing evidence in support of the agency's actions." *Hampson v. Department of Transportation*, 1994 U.S. App. LEXIS 419 (Fed. Cir. Jan. 7, 1994).

[8] My analysis would be very different if Yule had expressed to her supervisor that she believed signing the memorandum constituted a coverup to the NRC.

[9] All of the other guards signed the memorandum. Resp. Br. at 29, 31.

[10] The record is replete with testimony that Burns' security guards operated under a system of military-style discipline in which disobeying any order was considered a serious offense. *E.g.*, T. 398-399 (Larry Jones); 483-484 (Guy Thomas) ("There is simply not room for an employee, in a nuclear site, concerning nuclear security, . . . for an employee to be able to second-guess or question supervisors in times of direction.").

[11] Under the CNEPA amendments, which applied in this case,

> Upon the conclusion of [a] hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order.

42 U.S.C.A. § 5251(b)(2)(A). The relief prescribed in subparagraph (B) consists of action to abate the violation, reinstatement to the complainant's former position, and back pay. 42 U.S.C.A. § 5251(b)(2)(B).

The failure to issue such a preliminary order in this case is moot in light of this order dismissing the complaint.